SUPREME COURT, U.S.
FILED
FEB - 9 2010

No. 09-636

In The Supreme Court of the United States

SAMUEL SHABAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. Mr. Shabaz Did Not Waive on Appeal the Issue of Whether his Invocation of Counsel Was Unambiguous 1

II. The Officers Failed to Clarify Mr. Shabaz's Request for Counsel, as Required in the Second and Ninth Circuits 3

TABLE OF AUTHORITIES

Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 313 (1975) 5

Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 5

United States v. Plugh, 576 F.3d 135 (2nd Cir. 2009) 4

PETITIONER'S REPLY BRIEF

This case involves an important question of federal law that should be settled by this Court. Respondent's Brief in Opposition confirms that there is a split among the circuit courts, with the Second and Ninth Circuits holding that *Davis* applies only in post-waiver settings, and the Third, Fourth, Fifth, Sixth, and Tenth Circuits applying *Davis* in pre- and post-waiver settings. Importantly, Respondent does not deny that only the Second and Ninth Circuits have examined the issue of whether *Davis* applies in both settings. Instead, Respondent relies heavily on the argument that the Court should simply reject the Petition outright because Mr. Shabaz did not preserve this particular issue for appeal. Respondent also argues, among other things, that Mr. Shabaz would not be entitled to relief even in the Second and Ninth Circuits where *Davis* is applied only in post-waiver settings.

I. Mr. Shabaz Did Not Waive on Appeal the Issue of Whether his Invocation of Counsel Was Unambiguous.

The issue of whether Mr. Shabaz unambiguously invoked the right to counsel was not raised on appeal to the Seventh Circuit because there was no finding by the District Court that his invocation was ambiguous or in any way unclear. On the contrary, the District Court adopted the findings of the Magistrate Judge that Mr. Shabaz had requested an attorney with the following words: "am I going to be

able to get a lawyer?" (Pet. App. 18, 25) At no time did the Magistrate Judge or the District Court suggest that these words were ambiguous or otherwise insufficient to invoke Mr. Shabaz's right to counsel. Instead, the District Court found that FBI Agent Watson responded to Mr. Shabaz's request for counsel by directing him to the interview room, thereby "deferring" his right to counsel, but not denying it. (Pet. App. 18, 25) Thus, the issue before the District Court was not whether Mr. Shabaz had invoked his right to counsel, but whether he later knowingly had waived his *Miranda* rights. (App. 20)

The issues raised on appeal were whether the District Court erred in denying Mr. Shabaz's motion to suppress because (1) the agents wrongfully ignored his request for counsel and (2) Mr. Shabaz did not knowingly and voluntarily waive his *Miranda* rights. (Pet. App. 5) Again, there was no question that Mr. Shabaz's request for an attorney was unambiguous. Rather, it was the Seventh Circuit that re-framed the "key issue in this case" as "whether Shabaz clearly invoked his right to counsel." (Pet. App. 6) The Seventh Circuit ultimately held that Mr. Shabaz's request for counsel was not sufficiently unambiguous to invoke his right to counsel.[1] (Pet. App. 8-9)

---

[1] Indeed, the Seventh Circuit's framing of the issue appears to contradict the District Court's holding that there was a valid request for counsel which was "deferred." (Pet. App. 18, 20)

Therefore, Mr. Shabaz did not fail to preserve for appeal the issue of whether the *Davis* ambiguity rule should apply to pre- and post-waiver settings because the issue of whether Mr. Shabaz's request for counsel was unambiguous did not arise until the Seventh Circuit's decision. Mr. Shabaz raised the issue at his earliest opportunity, in his Petition to this Court.

II. The Officers Failed to Clarify Mr. Shabaz's Request for Counsel, as Required in the Second and Ninth Circuits.

Respondent also argues that, even in the Second and Ninth Circuits, Mr. Shabaz would not have been entitled to suppression of his inculpatory statements because the officers were permitted to clarify Mr. Shabaz's "ambiguous" request. In making this argument, Respondent incorrectly cites the rulings of the courts below as finding that Mr. Shabaz's statement, "Am I going to be able to get an attorney?" was ambiguous. On the contrary, as discussed at length above, the District Court did not find Mr. Shabaz's statement to be ambiguous.

Respondent also argues that the officers here were only attempting to clarify Mr. Shabaz's request for counsel, as permitted in the Second and Ninth Circuits. While Respondent correctly states the rule in the Second and Ninth Circuits that the officers may ask questions to clarify whether the suspect in fact wishes to invoke his right to counsel, the officers must limit themselves to "narrow questions only for

the purpose of clarifying the ambiguity." *United States v. Plugh*, 576 F.3d 135, 144 (2nd Cir. 2009). Here, the officers made no effort to constrain themselves to "clarifying the ambiguity." Indeed, as Respondent acknowledges in great oversimplification, following Mr. Shabaz's request for counsel, the officers "explained to petitioner why he had been arrested and outlined the topics they wished to discuss with him." (Opposition Brief at 10) In actuality, the officers ignored his request, took him into an interview room where he was handcuffed, told Mr. Shabaz why he was under arrest, and told him, "We know it's you." (Pet. App. 43-44) Even Respondent's simplified rendition demonstrates that the officer's statements have nothing to do with clarifying whether Mr. Shabaz had requested counsel.

Indeed, in the Magistrate Judge's Report and Recommendation, which was adopted in full by the District Court, he took the officers to task for making no attempt to clarify Mr. Shabaz's request. While the Magistrate Judge credited Mr. Shabaz's testimony that he stated, "Am I going to be able to get an attorney?" the Magistrate Judge found the officers' conduct to be wholly inadequate even if, according to Agent Watson, Mr. Shabaz had merely made a vague reference to "attorney" or "counselor" without more:

> Now, under Agent Watson's rendition of this, I'm troubled by the proposition that when a defendant in custody, which Mr. Shabaz plainly was, pursuant to an arrest warrant that had been issued, when an agent has a

> person in custody and the person makes reference to an attorney or counsel, that there is apparently a *lack of curiosity or interest in knowing what the defendant is referring to and finding out whether that is a request for counsel.*
>
> ***
>
> That is not conduct that is, in my judgment appropriate for officers or agents to – to do when they have a person in custody and they make reference to an attorney or counsel.

(Pet. App. 39-40) (emphasis supplied).

Respondent's casual suggestion that "surrounding circumstances" make it "clear" that Mr. Shabaz was willing to speak to the police without a lawyer cannot erase the officers' utter failure to clarify Mr. Shabaz's request, which should have been "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 313 (1975). As first stated in *Miranda*, "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained." *Miranda v. State of Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1629, 16 L. Ed. 2d 694 (1966).

CONCLUSION

Mr. Shabaz respectfully requests that this Honorable Court grant the writ of certiorari.

DATED THIS 10TH DAY OF FEBRUARY, 2010.

Respectfully submitted,

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz